

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
LYNCHBURG DIVISION

CLERK'S OFFICE U.S. DIST. COURT
AT LYNCHBURG, VA
FILED

JUL 21 2008

JOHN F. CORCORAN, CLERK
BY: *[Signature]*
DEPUTY CLERK

James E. Brown,

Plaintiff,

v.

Commonwealth of Virginia, et al.,

Defendants.

CIVIL ACTION NO. 6:07cv00033

ORDER

JUDGE NORMAN K. MOON

This matter is before the Court on the motions to dismiss for insufficient service of process pursuant to Federal Rule of Civil Procedure 12(b)(5) filed by Defendants Dr. Fred Schilling ("Schilling"), Colonel Glendell Hill ("Hill"), and the Virginia Department of Corrections ("VDOC") [Docket #14, #15]. The Court referred the pending motions to dismiss on May 7, 2008, to the Honorable Michael F. Urbanski, United States Magistrate Judge, for proposed findings of fact and a recommended disposition. On May 9, 2008, the Magistrate Judge filed a Report and Recommendation ("Report") and recommended that the motions to dismiss be denied with respect to Defendants' arguments of insufficient service of process.

Specifically, Judge Urbanski found that Plaintiff had properly issued summonses to Schilling, Hill, and VDOC and had delivered the summonses to the U.S. Marshal's Service in a timely manner, but that the Marshal's Service, not Plaintiff, failed to execute the summonses within the proscribed time frame.¹ As a result, Judge Urbanski found that Plaintiff had shown good cause for an extension of time to serve Defendants under Federal Rule of Civil Procedure 4(m), and

¹The U.S. Marshal's Service executed service on behalf of Plaintiff because he proceeds *in forma pauperis*. See Fed. R. Civ. P. 4(c)(3).

recommended that the motions to dismiss be denied, but only with respect to Defendants' argument of insufficient service of process. Judge Urbanski did not make any findings or recommendation as to Defendant Hill's arguments to dismiss for lack of subject matter jurisdiction or for the failure to state a claim upon which relief can be granted.

No objections have been filed to the Report within ten days of its service upon the parties. Having reviewed the entire record in this case, the Court therefore adopts the Report in its entirety. Accordingly:

1. the May 9, 2008 Report shall be, and it hereby is, ADOPTED in its entirety;
2. the motion to dismiss for insufficient process filed by Schilling and DOC is hereby DENIED;
3. the motion to dismiss filed by Hill is DENIED in PART, but only with respect to his argument of insufficient service of process, with all other arguments HELD in ABEYANCE.²

It is so ORDERED.

The Clerk of the Court is hereby directed to send a certified copy of this Order to all counsel of record and any unrepresented parties.

Entered this 21st day of July, 2008


NORMAN K. MOON
UNITED STATES DISTRICT JUDGE

²The Court will consider Hill's other reasons to dismiss the case against him in conjunction with the other pending motions to dismiss [Docket #38, #44] filed on similar grounds.